APPEAL NO. 93028

This appeal arises under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. art. 8308-1.01 *et seq*. (Vernon Supp. 1993) (1989 Act). On September 29, 1992, a contested case hearing (CCH) was held in (city), Texas, with (hearing officer) presiding as hearing officer. The hearing officer eventually closed the record, as discussed below, invalidated the designated doctor's impairment rating and adopted the treating doctor's 25% whole person impairment rating "as the correct impairment rating." Appellant, carrier herein, appeals on the basis that "no evidence was taken as to whether there was any difference" between the American Medical Association Guides to the Evaluation of Permanent Impairment, third edition (hereinafter AMA Guides) revised or the AMA Guides mandated by Article 8308-4.24. Respondent, claimant herein, did not file a response.

DECISION

We reverse and remand for the development of appropriate evidence, if any, and reconsideration not inconsistent with this opinion.

As recited above, the CCH was held on September 29, 1992, (although the decision recites September 28, 1992) in Abilene, Texas, to consider the following issue:

Whether the Commission should adopt the 17% whole body impairment rating of the designated doctor of 05-19-92, the 30% whole body impairment rating of the treating doctor of 09-17-91 or the 25% whole body impairment rating of the treating doctor of 08-13-92.

After hearing testimony from the claimant, two other witnesses, and admitting into evidence claimant's Exhibits 1, 2 and 3, carrier's Exhibit 1 and the hearing officer's Exhibit 1, the hearing was closed. Later in the afternoon of September 29th the hearing officer reopened the record, with permission of the parties, "for the sole purpose of taking official notice of the Guides to the Evaluation Permanent Impairment, third edition, of the American Medical Association." The record was closed again on September 29, 1992, and subsequently reopened on October 8, 1992, with permission of the parties, for the purpose of sending a letter to the designated doctor inquiring as to the device and brand name of the specific instrument used for range of motion tests conducted on the claimant. This was apparently done because claimant testified the designated doctor, (Dr. DE) had used a Sears Craftsman protractor or compass to measure her impairment. Attorneys for both the claimant and carrier were provided copies of the letter, with the record to remain open until a response was received from the doctor, which would be provided to both parties. Dr. DE responded to the hearing officer's inquiry by letter dated October 15, 1992 stating use of inclinometers are appropriate for obtaining reliable spinal mobility measurements and that his spinal measurements were performed with "2 standard gravity inclinometers." Dr. DE commented "[i]n accessing spinal motion the AMA guides (3rd edition revised). . . recommends the 2 inclinometer measurement technique (which is outlined in the AMA guides 3rd edition revised pg 79)." By letter dated November 19, 1992 the hearing officer

provided the designated doctor's response to the parties stating, "[i]f either of you feel we need to hold a further evidentiary hearing . . ." they were to contact the hearing officer by December 1, 1992. By letter dated November 24, 1992 the carrier stated that no further evidentiary hearing was needed. Claimant by letter dated December 1, 1992 stated the designated doctor failed to answer the question of the brand name of the inclinometer and that the doctor "should be required to answer those questions asked or be required to attend an additional hearing. If neither of the above is possible, then his answers should be removed from the record as nonresponsive and not material." The hearing officer replied by letter dated December 9, 1992, ". . . upon reflection I do not think that the brand name (of that instrument) would have any appreciable impact on the decision in this case." The hearing officer, apparently on review of the designated doctor's response to the letter inquiring of the brand name of the inclinometer, determined that the designated doctor's impairment rating was based on the AMA Guides "Third Edition (Revised)" and subsequently determined the impairment rating was invalid because the AMA Guides, Third Edition, second printing, dated February 1989, as required by Article 8308-4.24 had not been used. As the carrier notes, no evidence was taken and the issue of the correct version of the AMA Guides was never raised at the CCH.

As to the facts of the case, claimant was a 36 year old bank teller who injured her back on January 10, 1991, lifting a box of rolled coins from the trunk of a customer's automobile. Claimant testified she "took off" work February 1st when the pain became so severe she could not work. Surgery was performed on March 7, 1991 and claimant said she returned to work in May 1991. (Dr. OL) was claimant's treating doctor and on September 17, 1991, by TWCC-69, Report of Medical Evaluation, certified claimant had reached maximum medical improvement (MMI) on September 17, 1991 and had a 30% whole body impairment. Carrier disputed the 30% impairment rating and Dr. DE was designated by the Texas Workers' Compensation Commission (Commission) to examine claimant and assign an impairment rating. By report dated May 19, 1992, Dr. DE submitted a detailed narrative complete with figures and test results, found MMI as of May 19, 1992 and assigned a 17% whole body impairment rating. Claimant testified, and is supported by a witness friend, that Dr. DE used a "Sears Craftsman protractor or compass" in examining claimant. Claimant said she knew it was a Sears Craftsman instrument because it was so imprinted in red letters on the instrument. Claimant returned to Dr. OL who recertified claimant as reaching MMI on August 13, 1992 with a 25% impairment rating. The testimony of a physical therapist, who conducted the tests which were the basis of Dr. OL's August 13, 1992, 25% impairment rating, testified that he had checked Dr. DE's figures on his computer program and determined that Dr. DE's computations were correct. The testimony was that the difference in Dr. OL's August 13, 1992 and Dr. DE's May 19, 1992 impairment ratings was that Dr. DE failed to give enough weight to loss of sensation and loss of strength. The hearing was concluded, as recounted above.

Article 8308-4.24 states:

> The commission shall use the second printing, dated February, 1989, Guides to the Evaluation of Permanent Impairment, third edition, published by the American Medical Association for the determination of the existence and degree of an employee's impairment. All determinations of impairment under this Act, whether before the commission or in court, must be made in accordance with the above-named guide.

The hearing officer purported to take official notice of the version of the AMA Guides referenced in the 1989 Act, however he did not mention the second printing or date, nor did he, at the time he took official notice, mention the section of the 1989 Act. The requirement to use the version specified in the 1989 Act is mandatory, and in Texas Workers' Compensation Commission Appeal No. 92335, decided August 28, 1992, where the issue was raised on appeal, we held that only the February 1989 second printing of the third edition of the AMA Guides may be used in assessing an impairment rating. This is consistent with an apparent Legislative intent to achieve uniformity in permanent impairment income benefit determinations. *See* Montford, A Guide to Texas Workers' Comp Reform, Volume 1 § 4B.24, Butterworth Legal Publications, Austin (1991). Thus Dr. DE's gratuitous remark suggesting that he used the "AMA Guides 3rd edition revised" in his October 15, 1992 response to the hearing officer's questions regarding the use and brand name of the inclinometer or goniometer used, if any, served to invalidate his impairment rating.

We note the bulk of the CCH regarded use of an inclinometer, use of a computer program by a physical therapist, accuracy in determining impairment ratings, and the brand name of the inclinometer, if any, that Dr. DE used. We note that claimant had asked for a further evidentiary hearing to examine Dr. DE on the issue of the inclinometer brand name, and in the alternative suggested if Dr. DE was not going to answer those questions, then Dr. DE's ". . . answers should be removed from the record as nonresponsive and not material." The hearing officer, however, stated "I do not think that the brand name would have any appreciable impact on the decision in this case" and proceeded to invalidate the designated doctor's impairment rating on his own initiative, without allowing or soliciting comment from the parties. In a recent case, Texas Workers' Compensation Commission Appeal No. 93001, decided February 19, 1993, we reversed and remanded a case where the parties had not been given sufficient time to respond to a designated doctor's report at the close of the hearing, much as the case here, where the hearing officer apparently invalidated the designated doctor's report, when the correct edition of the AMA Guides had never been at issue. In the cited case we observed that "[h]ad a period of time been specified for comment by the parties regarding the designated doctor's report prior to the decision, this remand may have been avoided." Similarly had the hearing officer indicated that an improper version of the AMA Guides was used prior to his decision, the matter might have been resolved at the CCH level.

We have repeatedly stressed the importance and "unique position" the designated doctor's report occupies within the scheme of the 1989 Act. *See* Texas Workers' Compensation Commission Appeal Nos. 92412, decided September 28, 1992, and 92686, decided February 3, 1993. A designated doctor selected by the Commission, in accordance with Article 8308-4.26(g) becomes, in essence, the Commission's medical expert. In Texas Workers' Compensation Commission Appeal No. 92595, decided December 21, 1992, we noted that the designated doctor serves at the request of the Commission and it is the responsibility of the Commission, rather than either of the parties, to insure that the designated doctor supplies the information required under Texas Workers' Compensation Commission Rules, 28 TEX. ADMIN. CODE § 130.1 (Rule 130.1). If the information supplied is unclear, or the dictates of the 1989 Act have not been followed, it is appropriate for the hearing officer, in carrying out his or her responsibilities, to fully develop the facts required, in accordance with Article 8308-6.34(b), to seek additional information.

In Texas Workers' Compensation Commission Appeal No. 92335, *supra*, we suggested that if the version of the AMA Guides the designated doctor used "could be found to be identical to or not significantly different from the 1989 Act's version" this might meet the requirements of the 1989 Act. In the alternative, we might note that the hearing officer, upon noting that the incorrect version of the AMA Guides had been used, might have referred the report back to the doctor for recomputation using the mandated version of the AMA Guides.

Finding that the improper version of the AMA Guides was used and that the parties were not afforded an opportunity to respond, we reverse and remand. Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party, including claimant, who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's division of hearings, pursuant to Article 8308-6.41. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

Thomas A. Knapp
Appeals Judge

CONCUR:

Stark O. Sanders, Jr.
Chief Appeals Judge

Philip F. O'Neill
Appeals Judge